No. 320. 79

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JAMES H. McKENNEY,
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Brief of Beckett for Appellees (Mo

Filed Sept. 27, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 320.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT, AND THE RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI ET AL.

MOTIONS TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT OF SAME.

R. C. BECKETT,
Attorney for the Motions.

(17,434.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1899.

No. 320.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, APPELLANT,

vs.

WIRT ADAMS, STATE REVENUE AGENT, ET AL., APPELLEES.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF MISSISSIPPI.

MOTIONS TO DISMISS OR AFFIRM.

Come all the appellees and move this honorable court to dismiss this appeal, first, because it is an appeal in an injunction suit, and the purpose and object of said injunction bill and suit have failed, and the questions herein involved have become *res adjudicata;* and, second, because this court has no jurisdiction of this appeal, or to affirm the decree, it being manifest that even if this court has jurisdiction the

said appeal was unnecessary and taken for delay only; and, besides, the questions on which jurisdiction depend are so frivolous as not to need further argument.

R. C. BECKETT,
Attorney for said Appellees.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1899.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, *Appellant*,
vs.
WIRT ADAMS, *State Revenue Agent*, ET AL., *Appellees.*
No. 320.

Appeal from the circuit court of the United States for the southern district of Mississippi.

NOTICE.

To Mr. EDWARD MAYES,
Attorney of Record for Appellant in the Above-entitled Case:

You are hereby notified that the appellees in the above-entitled cause will, on Monday the day of , A. D. 1899, on the meeting of the Supreme Court of the United States on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the court the motion to dismiss or affirm and the brief of the argument thereon, both hereto attached.

R. C. BECKETT,
Attorney for Appellees.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, A. D. 1889.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, *Appellant*,
vs.
WIRT ADAMS, *State Revenue Agent*, ET AL., *Appellees.*
No. 320.

Appeal from the circuit court of the United States for the southern district of Mississippi.

AFFIDAVIT OF SERVICE.

Before me, L. B. Moseley, clerk of said circuit court of the United States for said southern district of Mississippi, at my office at Jackson, in said district, this day personally appeared the above-named appellee, Wirt Adams, well known to me as such, and, being by me duly sworn, deposes and on oath says that on this day he delivered in person to Mr. Edward Mayes, one of the attorneys for said appellant, The Yazoo and Mississippi Valley Railroad Company, in person, a true copy of the attached motion, notice, and brief of the argument, together with a copy of his affidavit on file, and brief of Marcellus Green.

Sworn to and subscribed before me this day of , 1889.

, *Clerk.*

, *Appellees.*

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1899.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY, *Appellant*,
vs.
WIRT ADAMS, *State Revenue Agent*, ET AL., *Appellees.*
No. 320.

Appeal from the circuit court of the United States for the southern district of Mississippi.

Statement and Brief on Motions to Dismiss or Affirm.

STATEMENT.

Unlike the two preceding cases, Nos. 318 and 319, this suit is brought in the name of the proper plaintiff, The Yazoo and Mississippi Valley Railroad Company, the owner of the property on which taxes are sought to be collected.

We do not think it necessary to make a long statement in this case for the court to properly understand the grounds on which the motions to dismiss or affirm are based.

It is an injunction bill brought by the appellant to enjoin the sheriffs and tax collectors of the various counties in which the railroad is located from distraining the property for the taxes, and to enjoin the revenue agent from bringing suit for the same.

It embraces two railroads—one formerly the property of the Natchez, Jackson and Columbus Railroad Company, which was purchased by the Louisville, New Orleans and Texas Railway Company in March, 1890, under the legisla-

tive act of February 19, 1890 (Laws of 1890, page 675), and the other the original Louisville, New Orleans and Texas railroad, all of which became the property of the appellant by a consolidation on October 24, 1892, between said Louisville, New Orleans and Texas Railway Company and the original Yazoo and Mississippi Valley Railroad Company, under the name of The Yazoo and Mississippi Valley Railroad Company, the present appellant.

The taxes sought to be enjoined are the State, county, and municipal taxes for the year 1898.

The sheriffs and tax collectors all filed identical answers, as follows:

"I, —— ——, sheriff and tax collector of said —— county and one of the defendants in this suit, in answer to the bill say that I have not seized or levied on, nor am I about to seize or levy on, said railroad or property for taxes, and have not given said railroad company or its agents or officials any reason to believe that I was by threats or otherwise, and the application for an injunction against me in this case is unnecessary and uncalled for.

—— ——,

"*Sheriff and Tax Collector of —— County.*"

Record, p. 18, and agreement, par. 5, p. 20.

These answers were nowhere traversed or disputed. (See judge's note of evidence, Record, p. 19).

On the bill and these answers said sheriffs and tax collectors and said State revenue agent made a motion to discharge the temporary restraining order and refuse an injunction, and the plaintiff made a counter-motion to grant the injunction.

The motion of defendants was on the following grounds:

"1st. On the disclaimer of the sheriffs and tax collectors hereto attached and herewith tendered the granting of an injunction would be unnecessary and improper.

"2d. The said revenue agent has no authority to distrain, levy on, or sell anything, but only to sue in a court of competent jurisdiction for said taxes, and an injunction against him is a suit against the State of Mississippi and forbidden by the eleventh amendment to the Constitution of the United States."

"3rd. This court has no jurisdiction.

"4th. Plaintiff is not entitled to an injunction or any relief on the facts stated in the bill."

Record, pp. 18, 19.

This motion was sustained in the following order:

"This cause came on to be heard on the motion of the defendants to discharge the restraining order heretofore granted, and to refuse the injunction as prayed for in the bill, and both motions were heard together by consent, notice on both sides being waived, and the court, after hearing the pleadings, exhibits and evidence for and against, and arguments of counsel on both sides, after due consideration, finds that the complainant has shown no right to invoke the jurisdiction of this court, and further being of opinion that this court has no jurisdiction, it is therefore considered, and so ordered, adjudged and decreed, that the motion to discharge said restraining order is sustained, and said restraining order is hereby discharged; and it is further ordered that said motion to grant an injunction is overruled and the injunction refused."

Record, p. 51.

From this order an appeal was taken to the United States circuit court of appeals for the fifth circuit, at New Orleans, which dismissed the appeal for want of jurisdiction.

Record, pp. 53, 56.

After this dismissal the defendants, at the May term of the circuit court, on May 1, 1899, made a motion to dismiss the bill on the ground "that the sole object of said original bill was for an injunction as therein shown, which injunction was refused by this court, and from the decree refusing said injunction an appeal was prayed to the United States circuit court of appeals for the fifth circuit: which appeal was by said court of appeals dismissed for want of jurisdiction, as appears from the copy of the opinion of said court now here shown to the court."

Record, p. 56.

This motion was sustained and the bill dismissed (Record, p. 56), from which decree this appeal is taken, and the judge certifies as follows:

He first recapitulates the allegations of the bill, of which the bill itself is the best evidence; then the grant of the restraining order, on December 17, 1898; then the motion of complainant for an injunction, as prayed in the bill, and the counter-motion of the defendants, The State Revenue Agent "and Railroad Commission and their Clerk" (this was a mistake, as it should be revenue agent and sheriffs and tax collectors), "to discharge the restraining order on the ground, amongst others, that the court had no jurisdiction to issue the same or to entertain the cause;" then recites the decretal order of February 8, 1899, discharging the

restraining order and refusing the injunction, and then the dismissal of the bill, on the motion of defendants (same mistake), on May 1, 1899, and then certifies:

"Now, therefore, it is certified that the question of the jurisdiction of this court was in issue in said cause upon the grounds hereinbefore stated, namely:

"1. That the complainant by its original bill showed no jurisdiction in this court, because of the subject-matter stated, inasmuch as the bill set forth no proper Federal question.

"2. That there was no jurisdiction in this matter because the bill was a suit against the State of Mississippi, and in violation of the eleventh amendment to the Constitution of the United States.

"The court having dismissed the bill on the ground of want of jurisdiction, the foregoing two questions arising upon the pleadings, the process and the evidence are hereby certified to the Supreme Court of the United States for its decision in conformity with the fifth section of the act of Congress of the year 1891."

Record, pp. 62, 63.

The only fault we find with the final decree dismissing the bill is that it orders us to go hence "*without delay*," like we were Filipinos.

Record, p. 56.

The order granting the appeal states that "this appeal is granted solely on the question of jurisdiction, the court having refused to assume jurisdiction in this cause."

Record, p. 58.

The assignment of errors is that "the court erred in dismissing the bill filed by the complainant herein for want of jurisdiction to entertain the same."

Record, p. 57.

The petition for appeal is under section 5 of the act of Congress of March 3, 1891, because the bill was dismissed "for want of jurisdiction."

Record, pp. 56, 57.

It is further shown by the affidavit of the appellee, Wirt Adams, State revenue agent, that after the restraining order was discharged and injunction refused, and an appeal to the circuit court of appeals was dismissed, and before the bill was finally dismissed or an appeal taken to this court, that the said revenue agent commenced two suits in the circuit court of Hinds county for the taxes of 1898 involved in this suit, one suit being for the taxes on the former Louisville, New Orleans and Texas railroad proper, and the other for the taxes on what was formerly the Natchez, Jackson and Columbus railroad, and that the issues were narrowed down by the pleadings in each case to two points: First, whether the assessment made by the railroad commission as State railroad assessors was *res adjudicata* and final; and, second, whether the case No. 2788, consolidated, being Nos. 8629 and 9251, and being No. 244 here, was *res adjudicata;* that both of said contentions were decided in favor of the revenue agent and a final judgment entered in his favor, from which an appeal by the appellants is now pending in the State supreme court, which is claimed as a bar to this appeal.

See printed affidavit, original on file.

BRIEF.

From the foregoing facts it is evident that there are four questions now involved:

1st. It being a pure injunction bill and the restraining order having been discharged and injunction refused, and the State revenue agent having commenced suits in the State court, where all defenses here set up can be fully availed of, both in the State supreme court and on writ of error from this court, and having obtained judgments in the State circuit court, which are now pending on appeals in the nature of writs of error to the State supreme court, whether that is not of itself a bar to this appeal, and whether a further prosecution of the same is not, under the circumstances, both unnecessary and improper?

2d. Whether an appeal lies to this court under the first class or jurisdiction-alone clause of the fifth section of the judiciary act of March 3, 1891, where other questions are decided in addition to the question of the jurisdiction of the court below as a Federal court?

3d. Whether any proper Federal question is involved on the merits of the case?

4th. Whether the suit as it now stands is not a suit against the State of Mississippi?

FIRST POINT.

That this being an injunction bill and the injunction refused, and a suit having been brought and judgment obtained in the State court, from which a writ of error is now pending in the State supreme court, in which any Federal question can be reviewed by a further writ of error to this court, is not that judgment or those judgments a bar to the further prosecution of this appeal, rendering the same both unnecessary and improper? It may be claimed that the suits in the State court were brought and process served only the day after the circuit court of appeals had dismissed the appeal to that court, on April 25, 1899, and before the week expired within which, by the rules of that court, they were entitled to file a petition for rehearing, but it is settled law that it is the judgment or decree, and not the petition for rehearing or mandate, that controls. The party may have to take the risk of a rehearing or reversal, but that is all, and none was granted.

Foster *vs.* Jordan, 54 Miss., 509, 510.

Opinion of November 28, 1898, in the writ of error case in this court, No. 244, p. 678.

In re Jugiro, 140 U. S., 291.

Long *vs.* Perine, 44 W. Va., 243, 245.

2nd Ency. Pldg. & Prac., p. 332, § 7.

Barton *vs.* Long, 45 N. J. E., 161.

Atlantic, &c., *vs.* Lemar, 10 Paige, 505.

Burnett *vs.* Fouche, 79 Ga., 377.

If the appellant had desired the appellees to be prevented from bringing suit *pendente lite* he should have applied to the United States circuit court of appeals, which he did not do so far as the record shows, and if he did *in pais* it is evident that he met with a cold shoulder.

Jewett *vs.* Albany City, 1 Clarke Ch. (N. Y.), 59.
2 Ency. Pldg. & Prac., p. 332, § 7, n. 3.
In re Ayers, 123 U. S., 443.
Fitts *vs.* McGhee, 172 U. S., 524–538.

The pendency of a former suit must be set up by a plea in abatement and must be verified by affidavit, neither of which was done.

Vose *vs.* Reed, 1 Woods (C. C.), 647.
Simmons *vs.* Thomas, 43 Miss., 39, 40.
Moore *vs.* Cox, 46 Miss., 604, 605.
Fenwick *vs.* Grimes, 5 Cr. (C. C.), 603.
White *vs.* Whitman, 1 Curt., 494.
Stevens *vs.* Monongahela, 111 U. S., 197.
Bellamy *vs.* Oliver, 65 Me., 109.

And a plea of former suit pending has no application where the parties are reversed. It was only intended to prevent the same plaintiff from oppressing the same defendant with a multiplicity of suits.

New England Screw Co. *vs.* Bliven, 3 Blatchf., 240.
Paul *vs.* Hurlburt, 5 Reporter, 738.
Same case, 18 Federal Cases, 1345.
Seymour *vs.* Malcolm, 58 Fed. R., 961.
Same case, 7 C. C. A., 593.

The rule is that a writ of error does not suspend or affect the effect of a judgment as *res adjudicata*. For full discussion of this, see further on in this brief under the head of *res adjudicata*.

And the judgments in the State court can be used as *res adjudicata* here, although the suit in the State court was commenced after the suit in the circuit court of the United States, for that was a suit *in personam*, while the suits in the State court are where the court had full jurisdiction of the person and subject-matter.

Stout *vs.* Lye, 103 U. S., 66.
Oakes *vs.* Mose, 165 U. S., 363, 364.
United States *vs.* Dewey, 6 Biss., 501.
Nugent *vs.* Philadelphia, &c., 87 Fed. R., 251.
Bryar *vs.* Bryar, 78 Fed., 657.
Bank of U. S. *vs.* Merchants' Bank, 7 Gill (Md.), 415.
Paine *vs.* Schenectady, 11 R. I., 411.
Bank of N. A. *vs.* Wheeler, 28 Conn., 433.
McGilvray *vs.* Avery, 30 Verm., 538.
Rogers *vs.* Odell, 39 N. H., 452.
Union Pac. R. R. Co. *vs.* Baker, 5 Kans. App., 253.
Memphis, &c., R. R. Co. *vs.* Grayson, 88 Ala., 572.
Same case, 7 Southern Rep., 122.
1 Chitty on Pldg., 454.
(1st ed.) 12 Am. & Eng. Ency. Law, p. 149 (*c*) and n. 3 and 4.
Weeks *vs.* Harriman, 18 Atl. R., 87 (1889, N. H.).

And it is well to remark that all distinctions between writs of error and appeals and all distinctions between judgments and decrees are abolished (Annotated Code of Mississippi of 1892). Section 31 abolishes all distinction between appeals and writs of error. Section 594 provides that all the effects of both shall be the same, and section 32 provides, in case of a final judgment or decree, "in no case shall such appeal be held to vacate the judgment or decree," and this whether there is supersedeas or not.

So this case is *res adjudicata* both for the same taxes involved here and, as we will show hereafter, by former judgments for the taxes of the years 1892–1897, inclusive; and one point we wish to impress here is that the sheriffs having disclaimed and the State revenue agent having actually brought suit at a time when he had a perfect right to do so, a reversal would prove abortive, and this appeal and suit have no further excuse for living. The sheriffs have not seized anything, and the State revenue agent has actually brought suit, where all questions involved here could be and were set up, and a judgment rendered in favor of the revenue agent, from which an appeal in the nature of a writ of error is now pending in the State supreme court, and from which any Federal question can be brought directly by a writ of error.

The fact that the suit was commenced in the Federal court first is a mere difference between tweedledum and tweedledee, for in either event this court has the last and paramount right to settle any Federal question that may be involved, and the bringing of the suit in the State court is evidence *per se* that the sheriffs and tax collectors have no intention to and cannot now resort to any summary process of seizure or distraint. The defendant now has all that it has asked, and cannot be prevented from raising or taking advantage of any Federal question it may be entitled to. It has a plain, untrammeled opportunity at law, and no excuse for invoking the aid of equity, and this appeal should be at once dismissed as being intended to tangle up and delay the trial of the case and cut the State out of that much interest, for taxes do not bear interest till after judgment.

and a reversal of this case and setting aside of the judgment in the State court on any mere question of practice would result in a loss to the State of at least six months' interest on about $113,000 and a bonus of that much to the appellant.

SECOND POINT.

That the appeal in this case is expressly prayed and granted and certified under the first class or jurisdiction-alone clause of the fifth section of the act of March 3, 1891, and as the record shows that the injunction was refused and bill dismissed on both Federal and non-Federal grounds, this court has no jurisdiction of such an appeal, and it should be dismissed.

We think the appeal in this case should be dismissed, not only—

1st. Because the certificate of the judge does not show that the two questions certified were the only questions on which the court acted, or that a reversal as to them would affect the decree in the least; but also—

2d. Because the record shows that there was another ground for the dismissal, which was non-Federal.

This court has held that an appeal does not lie to this court except from a final decree, and also that it was not the intention of the act of March 3, 1891, that this court should be called on to try cases piecemeal.

Columbus, &c., *vs.* Crane Co., 174 U. S., 600.

Kingman *vs.* Western Mfg. Co., 170 U. S., 680.

It is true that the first subdivision of the fifth section of that act provides that appeals may be taken to this court "in any case in which the jurisdiction of the court is in issue. In such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision;" but that, while on its face it would seem to justify an appeal where other questions are involved, must receive a reasonable construction and be held to apply to cases only in which the decision of this court, on *reversing* the ruling of the court below, would have some effect on the case.

For instance, if the court below should dismiss a case solely on the ground that there was no Federal question involved where the parties were all residents of the same State, a reversal by this court would restore the case to the docket to be proceeded with.

So also if the court below should dismiss solely on the ground that it was a suit against the State, or on this and the preceding ground combined. Other instances might be imagined on the side of the plaintiff.

Now take the defendant. If the court below should hold jurisdiction against the protest of the defendant in either or both of the above-supposed cases, or others, and should eventually render a decree *against the defendant*, and he did not care to contest the merits, he could appeal under this subdivision on the question of jurisdiction alone, although there might have been many questions involved and decided on the merits, for in those cases a reversal by this court of the lower court would result in a dismissal of the case.

But it is easy to see that if the lower court should dismiss a bill because it had no jurisdiction as a Federal court, and also because it had no jurisdiction as a court of equity, or on the merits, or because the plaintiff had not made out a case, or was not the proper party to bring the suit, and an appeal taken, and the question of jurisdiction alone certified, and this court should reverse the lower court on the only issue before it, what would it all amount to? Nothing; the decree would still stand on the other grounds. This court is not a moot court, to settle literary discussions or make *unfruitful decisions*, even between real litigants.

This court has expressly held that the jurisdiction of the court referred to in the first subdivision of the fifth section means the jurisdiction of the circuit court *as a Federal court*.

Blythe *vs.* Hinckley, 173 U. S., 501.

And our contention is, that if there were other questions decided which did not go to the jurisdiction of the court as a Federal court, and the case and decree of the court below is in that position and condition where a decree of this court would in no event change, alter, modify, or reverse the decree of the court below, then an appeal does not lie under said first subdivision, but would have to be taken under the appropriate fourth, fifth, or sixth class or subdivision, so that this court could pass on the whole case.

This is virtually the course suggested in Robinson *vs.* Caldwell, 165 U. S., 359.

And here we wish to make the suggestion that in Robinson *vs.* Caldwell and the cases leading up to it this court has made a very strained construction, but we suppose it was

the best they could do under the circumstances without creating chaos.

The fifth section of the judiciary act of March 3, 1891, gives a direct appeal or writ of error to this court in certain cases, and the sixth section gives an appeal or writ of error to the circuit courts of appeals in all cases *other* than those provided for in the fifth section; and yet this court has actually decided that an appeal or writ of error can be taken to either court, which makes them courts of co-ordinate or concurrent jurisdiction and mercilessly kills poor "*other*."

They seem to work it out this way, viz., that if a case involving a statute, treaty, or the Constitution of the United States is brought here and the court gets jurisdiction on that ground, it will then go on and decide the whole case; and this looks reasonable; but this construction would necessarily deprive the circuit courts of appeals of all jurisdiction in that class of cases, unless the construction of the law, treaty, or Constitution was waived, for it is evident that it was the intention of Congress to retain and preserve full and ample jurisdiction in this court in all such cases, and just as evident that it did not intend that primary jurisdiction should exist in both courts at the same time in the same case. If it were not for the concluding portion of the courts of appeals section 6, that in all cases not made final in those courts "there shall be of right an appeal or writ of error or right of review of the case by the Supreme Court of the United States, where the matter in controversy shall exceed one thousand dollars, besides costs," it would appear that an appeal or writ of error would not lie to the circuit courts of appeals in any case in which a law, or treaty, or the Constitution of the United States was directly questioned or its

construction put in issue, notwithstanding other questions might also be at issue, and under such circumstances that an appeal or writ of error to the circuit court of appeals would be held to be a withdrawal or waiver of such question, if it could be waived, in the particular case. This part of said sixth section may probably refer to some other question that might arise before or after the case got to the court of appeals, or it might have been put in for safety, to provide against unforeseen contingencies or a failure of justice. It is hard to tell what it does mean. As it has a monetary limit, it would not seem to be specially constructed for constitutional questions, and from the fact of its uncertainty, it would not seem to be a correct construction to let it displace the certain and definite word "*other*."

There are cases where the latter part of this sixth section can be made effective. For instance, if the lower court should decide the Federal questions in plaintiff's favor, and then decide against him on the merits, as this court has frequently done (in 132 U. S., 174; 146 U. S., 302, &c.), the plaintiff could appeal to the circuit court of appeals; and if that court reverses and decides the merits in his favor, then the defendant should be allowed an appeal or writ of error to this court from the court of appeals on the Federal question, &c.

The circuit court of appeals for the fifth circuit evidently dismissed the appeals in this and the two preceding cases, Nos. 318 and 319 here, on the ground that if a construction of the Constitution and laws of the United States was involved and was actually in controversy and put in issue in the court below and could not be waived, then it had no jurisdiction. It is perfectly plain that the constitutional

questions, having been decided against the plaintiff, could not be waived in these cases, because a waiver would necessarily affirm the decree of the court below and render the appeal itself abortive. It seems to us that the true construction would be that where a losing party has a *bona fide* question of that kind, and either intends or is forced by the nature and status of his case to insist on it, that it limits the exclusive jurisdiction to this court, and that where other questions are also involved, and the case is in that state and condition that the Federal question can be waived and the case still go on and be disposed of on the other questions, then an election to appeal or obtain a writ of error to the circuit courts of appeals is a waiver and abandonment of any right to insist on a Federal question, as much so as if a written agreement to this effect was signed and filed with the appeal papers, just like the issuance of an injunction against an execution is a release of errors in the judgment. So an appeal or writ of error to the court of appeals should be held to be a release of all errors as to the construction of a law, treaty, or the Constitution of the United States.

This is explanatory of our understanding of the action of the circuit court of appeals. The exact point we make here is that if the appeal is taken to this court under the first or jurisdiction-alone clause of the fifth section of the judiciary act of March 3, 1891, the jurisdiction of this court is limited to a review of the jurisdiction of the court below as a Federal court alone, and that it cannot review any other question. We think that clause was intended as a simple and easy method of settling this question expeditiously, and thus many times saving further expense and delay; but that if the court below goes on and decides other

questions fatal to the plaintiff's claim, then this court must dismiss the appeal, for the reason that on such an appeal they have no jurisdiction to decide the other questions, and as a necessary consequence no jurisdiction at all.

Now, when we examine the record for the grounds on which the decree of dismissal is founded, we find that it sustains a motion to dismiss.

When we examine the motion to dismiss, we find that it gives as the ground that the bill is a pure injunction bill, and the injunction refused and an appeal to the circuit court of appeals for the fifth circuit dismissed. Then, as no leave was ever asked or granted or refused to amend, and no amendment of the bill ever made after the refusal of the injunction, we must go back to the interlocutory order or decree refusing the injunction for the reasons on which the refusal was based, and which necessarily and ultimately caused the dismissal of the bill. Then if we examine the decree refusing the injunction, we find that it is based on two distinct and independent grounds, as follows, to wit :

1st. The court "finds that the complainant has shown no right to invoke the jurisdiction of this court."

2d. "And further, being of opinion that this court has no jurisdiction."

Record, p. 51.

The court had granted a temporary restraining order and the plaintiff made a regular motion for an injunction on his bill.

The defendants made a counter-motion to discharge this restraining order, quash the writ, and to refuse the injunction.

The plaintiff's motion contained no specific grounds, but the defendant's motion contained four grounds, viz:

"1st. On the disclaimer of the sheriffs and tax collectors hereto attached and herewith tendered, the granting of an injunction would be unnecessary and improper.

"2nd. The said revenue agent has no authority to distrain, levy on, or sell anything, but only to sue in a court of competent jurisdiction for said taxes, and an injunction against him is a suit against the State of Mississippi and forbidden by the eleventh amendment to the Constitution of the United States.

"3d. This court has no jurisdiction.

"4th. Plaintiff is not entitled to an injunction or to any relief on the facts stated in the bill."

Record, pp. 18, 19.

Now, it is clear that the points raised by the second and third grounds of this motion are the ones certified by the judge, and the ones embraced in the second finding in the order refusing the injunction, that "this court has no jurisdiction," but they do not account for the first finding in this order, the "complainant has shown no right to invoke the jurisdiction of this court," clearly based on the above first and fourth grounds of the motion, and the judge does not certify this first finding, nor attempt to qualify or deny it.

It can only be accounted for by the first and fourth grounds of the motion, because any other construction would render the second finding entirely unnecessary and superfluous, and in face of the fact that on its face it purports to be en-

tirely unconnected with and *in addition to the other*, for the order itself says, "and further being of opinion," &c.

So we claim and insist that the record shows on its face that the first and prime cause of the decree refusing the injunction, and, as a necessary consequence, of the decree dismissing the bill, was a ground or grounds not going to the jurisdiction of the court as a Federal court, but as a court of equity, and that hence this appeal should be dismissed.

As we understand the reasoning of this court in other cases, it coincides with this view.

They hold that the question of the jurisdiction of the court as a Federal court must be the controlling question—that is, as we understand it, it must be the controlling question, at least to the extent that the decision of it by this court would produce some effect, not only on the opinion, but on the *decree* of the court below.

Carey *vs.* Houston, 150 U. S., 170, 181.

Now, as shown *ante* in the statement, the certificate of the judge does not show that the questions certified were all the questions decided, and the record shows they were not. Even in his certificate he says expressly that the motion to discharge the restraining order and refuse the injunction contained, "*among others*," the ground of want of jurisdiction.

Record, p. 62.

While the record does not show affirmatively on what particular grounds the first finding was made, we can sug-

gest several why "the plaintiff has shown no right to invoke the jurisdiction of this court."

A.

After the sheriffs and tax collectors had all unanimously filed disclaimers and stated that they had not only not levied on or attempted to levy on or threatened to distrain or seize the property, but that they had never given the plaintiff any reason to believe that they would, and when this is coupled with the facts shown in the bills in the other cases, Nos. 559 and 560 in that court, Nos. 318 and 319 here, showing that in fact the litigations with these and other railroads had been going on year by year for many years, and that these tax collectors had never in a single instance ever attempted to seize, distrain, or levy on anything, and when all this stood unchallenged and undenied and undisputed, and the plaintiff permitted the motion to be heard in that state of the record and under that evidence, the application for an injunction stood against the State revenue agent alone to prevent him from bringing suit; and while this is expressly forbidden by section 720 of the Revised Statutes and by the eleventh amendment to the Constitution of the United States, we think it is not governed by them alone, but that no court of equity, State or Federal, would have or would exercise any jurisdiction to enjoin an officer or any other person, whether an officer or not and whether his claim was well or ill founded, from bringing a suit in the ordinary courts of law or equity, where every available defense could be set up and availed of.

Archer *vs.* Terre Haute, &c., 7 Am. & Eng. R. R. C., 249.

Same case, 102 Ills, 493.

B.

Res Adjudicata.

The opinions of the State supreme court, as shown by the judge's note of the evidence, were introduced in evidence, and a written agreement shows that this suit, No. 561 in the circuit court, was tried at the same time, and, together with cases No. 559 and 560, which are now pending on similar appeals here under the Nos. 318 and 319 (Record, page 20, paragraph 1), and this serves to identify the case in which the opinions of June 20 and November 22, 1898, were rendered, without introducing the whole case and making an unnecessary padding or enlargement of the record, and in cases where by statute the opinions are required to be in writing and filed the opinions themselves are the best evidence of what the court decided, although much of what the court did decide is shown in the bills in said cases Nos. 318 and 319.

Lawrence *vs.* Stearns, 79 Fed. R., 878.

Stearns *vs.* Lawrence, 83 Fed. R., 738.

The last opinion of the supreme court in said case, No. 244, was made February 20, 1899.

Record in that case, pp. 685, 688.

The decree of the judge refusing the injunction and quashing the restraining writ was made on February 7 and filed on February 8, 1899.

Record, pp. 51, 52.

And the final decree dismissing the bill was made on May 1, 1899, and shows on its face that it was made because this was an injunction bill and the injunction had been refused.

Record, p. 56.

There was no new evidence offered nor any application to amend the bill, and hence the bill was dismissed for matters submitted to the court on January 17, 1899, and passed on February 7, 1899. In the case No. 244, which, as shown *supra*, was introduced in evidence through the statements and admissions contained in the bill in Nos. 559 and 560 and the opinions of June 20 and November 22, 1898, the record of that case here shows that it was at that time pending on a second appeal to the State supreme court, which was not decided till *February 20, 1899*, and the writ of error from that case, which was No. 9251, was not sued out to this court till *March 3, 1899*.

See No. 244; Record, pp. 688, 690.

This court has very properly decided that the record of a cause embraces also any proceedings in the appellate court.

Watson *vs.* Jones, 13 Wall., 679.

What we are doing now is calling the attention of this court to the status of the litigation in said case here, No. 244, at the time this case was tried in the court below, so as to show exactly what was before the circuit court at the time the motions for and against the injunction were heard, and also at the time the bill was dismissed. The bill was not dismissed until May 1, 1899, after the writ of error in said

case No. 9251 was sued out to this court in said case No. 244 here, but that fact was in nowise brought to the attention of the circuit court, and hence is not in the record and cannot be considered as a part of this case. Besides, the first appeal, in which the decisions of June 20 and November 22, 1898, were rendered, was No. 8629 in the State supreme court, and there is no writ of error from that case, but only from the judgment on the last appeal in No. 9251.

Now, the decisions in the opinions of June 20 and November 22, 1898, which were rendered on the first appeal, in said case No. 8629, under the rulings of the supreme court of Mississippi and of this court and of all other courts proceeding according to the course of the common law, are final and conclusive and *res adjudicata* as to the taxes on this same Louisville, New Orleans and Texas railroad for the years 1892–1895, which were embraced in that consolidated suit and could not be in any manner reviewed or modified on a second appeal or writ of error in the same case.

Stewart *vs.* Stebbins, 30 Miss., 66.
Smith *vs.* Elder, 14 S. & M. (22 Miss.), 100.
Thompson *vs.* Maxwell, &c., 168 U. S., 451, 456.
McKinney *vs.* State, 117 Ind., 27, 28.
Agne *vs.* Seitsinger, 104 Iowa, 485, 486.
Long *vs.* Perine, 44 W. Va., 243, 245.

Indeed, the principle seems to be so universal that it is a waste of space and time to further particularize. Many of the authorities not referred to *supra* are collected in 2 Ency. Pldg. & Prac., pp. 373–380, and notes.

But even if it had been the first appeal instead of the second which was pending in the State supreme court, it is settled by the great weight of authority that if the effect of the writ of error or appeal in the nature of a writ of error is only to suspend execution and not to open up the case for a trial *de novo* in the appellate court that the judgment stands good till reversed, and the mere appeal or writ of error does not in any manner affect its force and effect as a judgment or as *res adjudicata*.

Kansas City, &c., R. R. Co. *vs.* Twombley, 100 U. S., 81.

Oregonian, &c., *vs.* Oregon, 27 Fed. R., 277, 284.

Cloud *vs.* Wiley, 29 Ark., 80.

Burgess *vs.* Poole, 45 Ark., 373.

Taylor *vs.* Shew, 39 Cal., 536.

N. Am. Bk. *vs.* Wheeler, 28 Conn., 441, 442.

Allen *vs.* Savannah, 9 Ga., 286.

Moore *vs.* Williams, 132 Ills., 589.

Nil *vs.* Comparet, 16 Ind., 108, 109.

Burton *vs.* Burton, 28 Ind., 342.

Randles *vs.* Randles, 67 Ind., 434.

Schieble *vs.* Slagle, 89 Ind., 328.

State *vs.* King, 94 Ind., 371.

Line *vs.* State, 131 Ind., 468, 470.

Vinsant *vs.* Vinsant, 49 Iowa, 641.

Faber *vs.* Hovey, 117 Mass., 108.

Hudemeyer *vs.* Hughes, 13 Mo., 89.

Fredericks *vs.* Clarke, 3 Mont., 258.

Creighton *vs.* Keith, 50 Neb., 810.

Same case, 70 N. W. R., 406.

Suydam *vs.* Hoyt, 25 N. J. L. (& 1 Dutcher), 230, 231.

Sage *vs.* Horpening, 49 Barb., 166.
Parkhurst *vs.* Burdell, 110 N. Y., 386.
Rogers *vs.* Hatch, 8 Nev., 35, 40.
Cain *vs.* Williams, 16 Nev., 426.
Merchants, &c., *vs.* De Wolf, 33 Pa. St., 45.
Paine *vs.* Schenectady, 11 R. I., 411.
Thompson *vs.* Kercheval, 10 Humph. (Tenn.), 322.
Furber *vs.* Carter, 2 Sneed (Tenn.), 1.
Cherry *vs.* Speight, 28 Tex., 503.
Thompson *vs.* Griffin, 69 Tex., 139.
Newcomb *vs.* Drummond, 4 Leigh (Va.), 58, 59.
Smith *vs.* Schriener, 86 Wis., 22–24.

And such is the doctrine of the common law.
Scott *vs.* Pilkinson, 110 Eng. Com. L., 11.
Same case, 2 Best. & S., 41.

And such is the effect of Mississippi judgments as understood in the cases of Cherry *vs.* Speight, 28 Tex., pp. 518, 519, and Smith *vs.* Schriener, 86 Wis., 23, *supra*, in referring to, among cases in other States—

Planters' Bank *vs.* Calvit, 3 S. & M. (11 Miss.), 143.
Kilpatrick *vs.* Dye, 4 S. & M. (12 Miss.), 289.
Montgomery *vs.* McGimpsey, 7 S. & M. (15 Miss.), 557.

The reasons are clearly given in 28 Conn., 441, 442; 117 Mass., 108; 8 Nev., 40; 16 Nev., 426, *supra*, &c., &c.
See also Hubbell *vs.* United States, 171 U. S., 209, 210.

So it is clear beyond any dispute that the decisions of June 20 and November 22, 1898, are *res adjudicata*, and can be pleaded as such to any suit in reference to the taxes on the same property for the years 1892, 1893, 1894, and 1895.

The question now is whether these decisions are *res adjudicata* to this suit, or, in other words, to a suit for taxes for years subsequent to 1895, or, in this case, the year 1898.

The bill in this case was filed and affidavit to it made on *December 16, 1898.*

Record, p. 13.

And both this court and the supreme court of Mississippi have decided that a suit for the taxes of one year is *res adjudicata* when pleaded or offered in evidence in a suit for the taxes of another year, as to the points necessarily involved and in fact decided in the former suit.

New Orleans *vs.* Citizens' Bank, 167 U. S., 389–401.

Southern Pac. R. R. Co. *vs.* United States, 168 U. S., 48–52.

Stone *vs.* Farmers' Bank, 174 U. S., 409, 412.

Smith *vs.* Kernochen, 7 How. (U. S.), 198.

Bissell *vs.* Spring Valley, &c., 124 U. S., 225.

Martin *vs.* Lofland, 10 S. & M. (18 Miss.), 317, 320.

Stewart *vs.* Stebbins, 30 Miss. (1 G.), 66.

Opinion of February 20, 1899, in said case No. 244, p. 685.

Hancock *vs.* Singer Mfg. Co., 42 Lawyer's Rep. Annotated, 852.

And generally see—

Bigelow on Estoppel, pp. 37–46.

In Martin *vs.* Lofland, 10 S. & M., 317, *supra*, property had been sold under executions, and a contest came up between two judgment creditors as to who was entitled to the proceeds, and it was decided in favor of one side. Afterwards in a different year other property was sold under other executions emanating from the same judgments, and a contest again arose over the proceeds between these same creditors. Here were different executions, different property, a different year, and different proceeds, and yet the court held that the first judgment settled conclusively their relative rights as flowing from the same judgments.

So in Stewart *vs.* Stebbins, 30 Miss., 66, *supra*, the court say:

"Whatever is necessarily determined by this court in deciding upon the propriety of the judgment of the court below, or in settling the principles to govern the case in any further proceedings necessary to be taken in it, is *res adjudicata*, and final and conclusive on the parties in that, *or any subsequent suit.*"

The italics are ours.

And in the case cited, on page 685, in No. 244 in this court, the court had decided certain questions "in settling the principles to govern the case in any further proceedings to be taken in it" in their opinion of June 20, 1898, on the first appeal in No. 8629 there, and when it was remitted to the trial court there were consolidated with it two other later cases for the taxes of two later years, 1896 and 1897, under the general former number 2788, and judgment was rendered for the plaintiff for all the years 1892, 1893, 1894, 1895, 1896, and 1897, and when it got back to the State

supreme court under its number 9251, from which a writ of error is now pending here under the said number 244, October term, 1899, the State supreme court in affirming the judgment say in reference to this question, "The former opinion of this court in this case settled definitely and conclusively all the issues involved," &c.

So not only has the supreme court of Mississippi agreed with this court that a judgment for the taxes of one year is *res adjudicata* in a suit for the taxes of a subsequent year as to the facts properly in issue *and actually decided*, but it has decided that very thing in the course of this same litigation about the taxes of 1892–1895, inclusive, and the taxes of 1896–1897, inclusive, so that the question whether it is *res adjudicata* is itself *res adjudicata* in this same litigation. It is true this opinion of February 20, 1899, had not been rendered when this case was decided on the motions in the court below on February 7, 1899, and as neither side introduced any new evidence on the motion to dismiss on May 1, 1899, it is probable that we cannot now on this appeal use it as a technical *res adjudicata*, but we can and do refer to it and the other two cases to show what the law of Mississippi is on this subject as construed and enforced by her highest court, and that it coincides with the holding of this court on the same subject.

And the question whether a decision in a State court that the suit for the taxes of a former year can be used as *res adjudicata* in a suit for the taxes of a subsequent year raises no Federal question.

Phœnix Ins. Co. *vs.* Tennessee, 161 U. S., 184–186.
Newport *vs.* Newport, 151 U. S., 527, 538.
In re Woods, 143 U. S., 202, 206.
San Francisco *vs.* Itsell, 133 U. S., 65.

This court has also decided that when the supreme court of a State has decided a point, it is equally *res adjudicata* when attempted to be again brought in controversy in the Federal courts as in the State court. The Federal courts, in accordance with the spirit of the Federal Constitution, will in ordinary cases give the same faith and credit to judgments in the State courts as are given to them by the State courts. They cannot be attacked collaterally, but must be brought up to this court through the proper medium of following along after the first suit in the State court.

Smith *vs.* Kernochen, 7 How. (U. S.), 198.
Parris *vs.* Ferris, 2 Black., 606.
French, trustee, *vs.* Hay, 22 Wall., 238.
Forsyth *vs.* Hammond, 166 U. S., 516–518.
Rosenthall *vs.* Coates, 148 U. S., 148, 149.
Chaffin *vs.* St. Louis, &c., 4 Dill., 24.
Hazard *vs.* Chicago, &c., R. R. Co., 4 Biss., 453.
Consolidated, &c., *vs.* Whitney, 2 Ban. & A., 30.
6 Federal Cases, pp. 342, 345.
5 Federal Cases, p. 408.
11 Federal Cases, p. 924.

The fact that one is a State court and the other a Federal court makes no difference. The question whether the judgment of a court of general jurisdiction, having jurisdiction of the subject-matter and the person, is *res judicata* in a subsequent suit on the matters litigated and determined in the former suit is one depending on general principles of law, and even the fact that it is decided by a Federal circuit court does not make it a Federal question or justify an appeal to

this court under any clause or class of the judiciary act of March 3, 1891.

Carey *vs.* Houston, &c., R. R. Co., 150 U. S., 179–181.
Blythe *vs.* Hinckley, 173 U. S., 507, 508.

In the last case this court say that an appeal will not lie to this court, even though the decision of the circuit court "is based solely on the binding force of the State judgment."

Ib., p. 507.

And further on they announce the doctrine that "it is not enough that the State court had concurrent jurisdiction to pass on the Federal questions thus intimated, for the Constitution, laws, and treaties of the United States are as much a part of the laws of every State as its own laws and constitution, and if the State court erred in its judgment, it is mere error and cannot be corrected through the medium of bills such as those under consideration."

Blythe *vs.* Hinckley, 173 U. S., 507, 508.

C.

The bill shows that the sheriffs and tax collectors had refused to receive the affidavits and give the receipts required by the exemplified charter sections of the original Louisville, New Orleans and Texas Railway Company and Natchez, Jackson and Columbus Railroad Company.

Pars. 13, 14, 15; Record, p. 8.

These charters say that it shall be the duty of the tax collector in each and every county in each and every year

to give the companies a receipt in full for the taxes on receiving a certain affidavit, "which receipt so given shall be in full of all taxes, State, county, and municipal."

Par. 2; Record, p. 2.

It will be noticed here that it is not the money or a tender of the affidavit which releases, **but the receipt itself.** Now, if the officer refuses to receive the affidavit and give the receipt, and his duties are merely ministerial, as claimed by the appellant, then equity has no jurisdiction, because there is a full, plain, and adequate remedy at law by mandamus. The statute provides that "on the petition of the State by its attorney general, or a district attorney, in any matter affecting the public interest, or on the petition of any private person who is interested, the writ of mandamus shall be issued by the circuit court, commanding any inferior tribunal, corporation, board, officer or person to do or not to do, an act, the performance or omission of which the law specially enjoins as a duty resulting from an office, trust or station, where there is not a plain, adequate and speedy remedy in the ordinary course of law."

Annotated Code of 1892, § 2846.

And it is careful to protect the plaintiff from injury *pendente lite*, for it provides that "during the pendency of the action the court or judge in vacation may make temporary orders for preventing damage or injury to the plaintiff until the case be decided."

Ib., § 2854.

So the officers could be directed to suspend any proceedings until the right to the receipt was settled.

And where there is an adequate remedy at law to prevent or correct an attempt to collect an illegal tax, this court holds that equity has no jurisdiction, and the decision of the circuit court as to that raises no jurisdiction in this court.

Smith *vs.* McKay, 161 U. S., 356–358.
Affirmed in No. 233, Black *vs.* Black, 163 U. S., 678.
No. 20, Tucker *vs.* McKay, 164 U. S., 701.
No. 256, Blythe Co. *vs.* Blythe, 172 U. S., 644.
Blythe *vs.* Hinckley, 173 U. S., 506, 507.
(3d ed.) 2 High on Inj., § 1218 and n. 2.
Archer *vs.* Terre Haute, &c., 102 Ills., 493.

D.

While the bill shows that an amount equal to the taxes for the year 1898 was paid on the construction debt of the Louisville, New Orleans and Texas Railway Company, and also on the construction debt of the Natchez, Jackson and Columbus Railroad Company, it does not show what became of the balance of the profits for the year 1898, or whether it was sufficient to pay the dividend of 8 per cent. on the capital stock or not, and does not show that the taxes had ever been paid on any construction debt previous to the year 1898. The express provisions of the charters are that it shall be so paid "*in each and every year* during the year."

Pars. 2, 13, 14; Record, pp. 2, 8.

They were not authorized to pay or apply the profits to betterments, purchase of other roads, or any other debts ex-

cept the construction debts in preference to the taxes. The State was merely a looker-on in Vienna, a passive surety, without any voice in the management, and they were required to deal fairly with it.

Mackintosh *vs.* Flint, 34 Fed. Rep., 592–616.
M. & O. R. R. Co. *vs.* Tennessee, 153 U. S., 506.
Barry *vs.* M., K. & T. R. R. Co., 27 Fed. R., 8, 9.

Being a matter peculiarly within their own knowledge, they should be required to keep accounts and make a clear showing of what was done with the profits each year.

Barry *vs.* M., K. & T. R. R. Co., 27 Fed. R., 8, 9.
St. Louis *vs.* Berry, 41 Ark., 521, 522.
Mackintosh *vs.* Flint, 34 Fed. Rep., 600.
M. & O. R. R. Co. *vs.* Tennessee, 153 U. S., 488, 489.
Raleigh *vs.* Reid, 13 Wall., 269.
1 Taylor on Evidence, § 376.
Great Western, &c., *vs.* Bacon, 30 Ills., 352, 353.

The bill in this case was filed on December 16, 1898. In the opinion of November 22, 1898, which the judge's notes show (page 49) was introduced in evidence in this case (see Record in case No. 244, pages 675, 676), the supreme court say:

"There is also much force in another view presented by counsel for the revenue agent to the effect that since 1888, the proof in the record shows that the railroad company has been able to declare and pay the annual dividend of 8 per cent. even upon its *fictitious* capital stock over and above its fixed charges on the proper construction debt. But to go into this would protract this opinion beyond anything necessary for present decision."

This certainly needed an explanation or denial. This is not a new case or new matter, and the plaintiff ought not to be allowed to go into the Federal court and get an injunction from the very fact of being indefinite, and not only that, but, as the record shows, of being purposely and studiedly indefinite.

E.

The bill sets out that the Louisville, New Orleans and Texas Railway Company was formed by a consolidation of the Memphis and Vicksburg Railroad Company and New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company with two foreign companies, under the act of March 3, 1882, as amended by the act of March 15, 1884, and that it "speedily constructed the railroad contemplated, so that the said railroad was so far complete as that through connection between its various working gangs was made and the first train ran on or about the first of October, 1884."

Pars. 7, 8, and 9; Record, pp. 4, 5.

But it very naively neglects to tell *when* that company was formed, or *when* the railroad was commenced, or how far complete at the time it was formed, and carefully abstains from filing the articles of consolidation. Under other circumstances this might be regarded as oversight of the pleader about things not occurring to him as material; but when we notice that there is no hesitation about giving dates about other things, we become a little skeptical and suspect a motive, and when we examine the opinion of November 22, 1898 (see Record in No. 244, pages 673, 674), the motive is at once revealed. There the State supreme court

holds that this twenty-first section is prospective, and shows that the Louisville, New Orleans and Texas Railway Company did "not come into existence until after the road from Memphis to New Orleans was completed."

In paragraph 9 of the bill in this case they are good enough to tell us that the road was constructed "under the charters of the constituent companies" (Record, p. 5); but in case No. 560, which is No. 319 here, the plaintiff, or rather its sponsor in that case, The Illinois Central Railroad Company, is not so gingerly with dates. In that case, No. 319, in paragraph 8 of the bill (see Record, pp. 11, 12) in that case, it is asserted that—

"The said railroad was speedily constructed by the aforesaid constituent companies and by the consolidated company in the years 1882, 1883 and 1884, so that through connection between the working gangs of said railroads was made, and the first train ran thereon, about the first of December, 1884."

Now, the Louisville, New Orleans and Texas Railway Company having been organized under the amendatory act of March 15, 1884, could not, of course, have built any railroad before that time, and it is not shown how long after that before it was formed, nor how much of the railroad was built before or how much after it was formed, or whether any part whatever was built above Vicksburg or below Vicksburg after it was formed.

The charter of the New Orleans, Baton Rouge, Vicksburg and Memphis Railroad Company, one of the constituent companies, never had any exemption at all and was authorized

to build all the way from New Orleans, via Vicksburg, to Memphis.

Laws of 1882, p. 920, § 1.

On the contrary, the Memphis and Vicksburg Railroad Company, the other constituent company, had this appropriation or exemption section, being section 21 of the charter of the Mobile and Northwestern Railroad Company, extended to it by the act of August 8, 1870.

Laws of 1870, p. 317, § 2.

For convenience see above two charters in case No. 244, pages 21 and 31, 40 *et seq.*

Now, if the Baton Rouge Company had built all that it was authorized to build, none of it would have been exempt, and there is nothing to show whether it did or did not.

See on this point R'y Co. *vs.* Blythe, 69 Miss., 943, 944.

But if the Memphis and Vicksburg Railroad Company had built *all that it was authorized to build*—that is, from Memphis to Vicksburg—and the Baton Rouge Company had built below Vicksburg, then, under ordinary circumstances and well-settled rules, the part above Vicksburg would have been exempt and the part below not exempt.

Keokuk *vs.* Missouri, 152 U. S., 305.

But, according to the allegations of the bill, all that was built before the consolidation was "built under the charters of the constituent companies," and if we reverse the rule in regard to charters and exemptions and construe these alle-

gations most strongly in favor of the pleader and most strongly in favor of the grantee and exemptionist and against the State, the most that can be said would be that the two railroad companies went in together and built the road jointly. Now, there was no authority before the consolidation to build any *joint road*, and certainly no law exempting any *joint road* from taxation.

There is a remarkable thing about this act of March 3, 1882, under which the Louisville, New Orleans and Texas Railway Company claims to have been formed, and which, therefore, would constitute its charter. It is a peculiarity we never saw in a charter before. It is the use of the word "*now*." The first section gives to the consolidated company all the immunities, &c., "**now**"—that is, on March 3, 1882—"possessed by the consolidating companies."

Laws of 1882, pp. 1011, 1012, § 1.
Record in No. 244, pp. 41, 42.

Now, in the Lambert case, being Natchez, Jackson & Columbus Railroad Company *vs.* Lambert, 70 Miss., p. 787, it is held that all exemptions were withdrawn by the Code of 1880, sections 597–608. In the suggestion of errors in said case No. 244, on the first appeal, which was filed on June 27, 1898, and was then a part of the case, it is openly admitted and asserted that all exemptions were withdrawn by the Code of 1880.

See Record in No. 244, pp. 519, 520.

So when the act of March 3, 1882, was passed giving to the consolidated company all the immunities now possessed

by the consolidating companies neither one of them had any exemption. The one never did have any, and that of the other had been and still stood withdrawn.

The plaintiff seems to recognize this, because we call particular attention to the fact that they do not claim any privilege or exemption whatever through the charter of either the Baton Rouge Company or the Memphis and Vicksburg Railroad Company, and do not even mention or claim that either one ever had any exemption.

They claim their exemption *entirely and exclusively* through the fifth section of the charter of the Louisville, New Orleans and Texas Railway Company, or act of March 3, 1882, as amended by the act of March 5, 1884.

Now, if we turn to this opinion of November 22, 1898, which was introduced in evidence, it expressly decides that this fifth section is *prospective*, and says that the Louisville, New Orleans and Texas Railway Company did not come into existence till after the road was built.

Record in No. 244, pp. 673, 674.

This is a finding of fact conclusive on this court.

Egan *vs.* Hart, 165 U. S., 188.

But, leaving all that out of consideration, it is an absolute fact that the bill does not show how much, or what part, was built after the formation of the Louisville, New Orleans and Texas Railway Company, and, if we were to concede that this fifth section was both prospective and retrospective and intended to exempt railroads already built, the plaintiff would be in no better plight, for this court has expressly decided that the exemption of a structure or railroad already

completed is a mere continuing gratuity and may be repealed, modified, or altered at pleasure without any violation of the Constitution of the United States, even though the recipients might afterwards incur expenses on the faith of it and build an inch or two, or a foot or two, or a yard or two, or a mile or two, it is not shown or claimed which.

Grand Lodge *vs.* New Orleans, 166 U. S., 143, and authorities cited.

Pearsall *vs.* Gr. N. R'y Co., 161 U. S., 666–668.

Tucker *vs.* Ferguson, 22 Wall., 527, 575.

West Wisconsin R. R. Co. *vs.* Supervisors, 93 U. S., 595.

F.

As shown under the first head, it was clearly improper to join the State revenue agent as a party to this suit, even if it had been proper to enjoin the sheriffs, and a misjoinder of parties is good reason for refusing an injunction.

(3d ed.) 2 High on Inj., § 1613, citing—

Hudson *vs.* Maddison, 12 Sim., 416.

Jones *vs.* Garcia, &c., Turn. & R., 297.

There are other non-Federal reasons for the first finding in the decree, but we will now pass on to the so-called Federal questions.

Second Finding in the Decree.

There are two findings in the decree refusing the injunction, and hence, as we have shown, two grounds on which the bill was dismissed—one that the plaintiff had shown no right to invoke the jurisdiction of the court and the other that the court had no jurisdiction.

We have now argued the first ground.

The second is divided by the judge's certificate into two grounds:

1st. That no Federal question was involved, and—

2d. That it was a suit against the State.

First Certified Ground.

That there is no Federal question involved.

It must be remembered always that this case was tried by agreement at the same time and together with the two previous cases, Nos. 559 and 560, in the court below, now here on appeal as Nos. 318 and 319, and that on the hearing of the motions in this case the decisions of the State supreme court of June 20 and November 22, 1898, were introduced in evidence, as shown by the judge's notes.

Record, pp. 20, 19.

This was all that was necessary to show what the supreme court decided in the opinions of June 20 and November 22, 1898, and then to show that those opinions were rendered for the taxes of 1892, 1893, 1894, and 1895 on the same

property in this suit, to identify the opinions with the case. We have already argued the effect of those decisions, and, as we think, shown that they are *res adjudicata* in this suit, and that hence no Federal question is involved in this suit. If any Federal question is involved, it is in that suit, which is now here on writ of error from the State court, and error, if error there be, can be corrected here in that suit, and as this court put it, "not through the medium of bills such as those now under consideration."

Blythe *vs.* Hinckley, 173 U. S., 507, 508.

Besides, we claim that as the Louisville, New Orleans and Texas Railway Company necessarily accepted its charter under the act of March 3, 1882, as amended by the act of March 15, 1884, it accepted it long after the supreme court had established the doctrine that all exemptions or appropriations of taxes were repealable under the constitution of 1869 in the year A. D. 1878, in the case of Mississippi Mills *vs.* Cook, 56 Miss. Reports, pp. 42, 43, 50, 51, 54, 55, 53, 62.

And while the charter of the Natchez, Jackson and Columbus Railroad Company was granted in 1870, yet the bill in said case No. 560, which is No. 319 here, shows that the railroad was not built till after the decision in the Mississippi Mills case and in reliance on it.

See Record in No. 319, p. —.

And hence we claim that if the question were *res nova* instead of *res adjudicata*, the holding that a *repealable* exemp-

tion was unconstitutional or had been lost by a consolidation or had been repealed raises no Federal question.

Louisville *vs.* Bank of Louisville, 174 U. S., 444.

Further, we hold that, considered as a straight appropriation of taxes from the State treasury, it is unconstitutional under sections 5, 13, 14, and 20 of article 12 of the constitution of December 1, 1869.

They are as follows:

"SEC. 5. The credit of the State shall not be pledged or loaned in aid of any person, association or corporation; nor shall the State hereafter become a stockholder in any corporation or association.

"SEC. 13. The property of all corporations for pecuniary profits shall be subject to taxation the same as that of individuals.

"SEC. 14. The legislature shall never authorize any county, city or town to become a stockholder in, or to lend its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a special election or regular election to be held therein, shall assent thereto.

"SEC. 20. Taxation shall be equal and uniform throughout the State. All property shall be taxed in proportion to its value, to be ascertained as directed by law."

Now, as to said sections 13 and 20 the supreme court of the State have shown that the principle of *stare decisis* cannot apply for two reasons:

1st. Because no charter identical with those under consideration was ever passed on until in the case of McCullock

vs. Stone, in 64 Miss., p. 393, and this Louisville, New Orleans and Texas Railway Co. *vs.* Taylor, in 68 Miss., p. 364, and both of them were fictitious cases, in which the court was misled into believing that the Mississippi Valley and Ship Island Railroad Company was one of the constituent consolidating companies forming the Louisville, New Orleans and Texas Railway Company, instead of the Baton Rouge Company, which never had any exemption, and were thus a fraud on the court and should not be allowed to be referred to as authority for any purpose.

See Opinion of Court in No. 244, p. 666.

These two cases were decided, the one at the October term, 1886, and the other at the October term, 1890, and hence could not have had any influence on the acceptance of charters, one granted in 1870 originally and the other in 1882, nor on the building of either of the roads, one being built about 1882 and the other in 1882–1884.

The next case was the famous Lambert case, 70 Miss., 779 decided at the March term, 1893, and, as shown by the State supreme court, the unconstitutionality of this section was not disputed nor contested in any of them.

See Opinion in said No. 244, pp. 659–671.

The court then recite the decisions of this court and of various State courts holding exemptions under constitutional provisions similar to said sections 13 and 20 to be unconstitutional, and state that the supreme court of Mississippi stands *absolutely alone* in its peculiar construction, and they

prefer now to overrule those unsound decisions and align themselves with this court.

See Opinions of June 20 and November 22, 1898, in Record in No. 244, pp. 514, 662, 670, 671.

Louisville & Nashville R. R. Co. *vs.* Palmes, 109 U. S., 248, 254.

St. Louis, &c., *vs.* Berry, 113 U. S., 475.

Schurz *vs.* Cook, 148 U. S., 408.

Keokuk, &c., *vs.* Missouri, 152 U. S., 303, 304, 310–312; 38 Iowa, 635; 34 Cal., 432; 25 Ark., 289; 19 Fla., 231; 53 Ala., 570.

See also Trask *vs.* McGuire, 18 Wall., 391.

The case of Yazoo and Mississippi Valley Railroad Company *vs.* Thomas, 65 Miss., 553, was decided at the October term, 1888, and was decided on writ of error from this court in 132 U. S., 174, at the October term, 1889, long after the charters were granted and railroads now in controversy were built, and this court in that case especially call attention to the fact not only that the State court did not pass on the constitutionality of the exemption (p. 184), but that it was conceded (p. 188).

If, on the contrary, counsel attempt now to claim that this is not an ordinary exemption, but an irrepealable appropriation of taxes, they are confronted with said sections 5 and 14 of article 12 of said constitution of 1869, above quoted, besides several other things.

It will be noticed that in said section 14 the legislature cannot "authorize any county, city or town to lend its

credit," and this has always been held to prohibit these so-called donations.

Now, said section 5 is much stronger in this respect than section 14. It says, "The credit of the State shall not be pledged or loaned," thus embracing every possible phase of it, so that there could be no mistake or misconstruction. A loan of credit might mean indorsement of bonds, suretyship, or something of that kind, but when the State is in the same connection forbidden to pledge its credit, it is prohibited as well from an agreement to donate as from a direct agreement to pay money, for when applied to the State they are, generally speaking, interconvertible terms, as the revenues of the State necessarily come from taxation, and an agreement to pay a person one thousand dollars is but an agreement to appropriate one thousand dollars of taxes to the payment. Hence, if this twenty-first section be considered with reference to the particular railroad alone, to donate to it or for its benefit its own taxes, it is in its essence nothing but an exemption to that extent, pure and simple; but if considered with reference to some other source . . . if the legislature had promised to donate to it the taxes due by some other railroad or from some other fund or directly out of the State treasury, then it is clearly a promise and pledge of the State in aid of this particular corporation, and as such clearly obnoxious to said section 5.

Section 14 prohibits any arrangement by which a county, city, or town shall be authorized to extend aid to a railroad, except by the consent of two-thirds of the qualified voters, and yet, if the contention of counsel for plaintiff in error is allowed to prevail, the legislature could have done for a

county, city, and town what it had no power to authorize the county, city, or town itself to do. This twenty-first section not only appropriates the State taxes, but by *an irrepealable agreement* it agrees to appropriate "all taxes, State, county, and municipal," and this without any consent whatever from the counties and towns interested. It will not do to attribute such impotence to solemn constitutional enactments.

The court will remember that under section 2 of article 7 of this same Constitution it was proposed to confer for the first time universal suffrage, including a great majority of those just emancipated and unused to its exercise and without property, and these constitutional safeguards were not mere idle forms, but, under those momentous circumstances, were each intended to accomplish a definite and practical result, much more necessary in this instance than in Commonwealths of greater experience, which had found it necessary to adopt substantially the same provisions.

Second Certified Ground.

That it is a suit against the State.

The sheriffs and tax collectors have all disclaimed and the plaintiff has now brought this suit up to this court on the naked proposition that it has a right to enjoin the State revenue agent, as the representative of the State, from bringing a suit for the taxes.

In the first place, section 720 of the Revised Statutes ex-

pressly prohibits injunctions in the Federal courts against proceedings in the State courts.

But this suit, as it now stands, goes further than that, and is plainly a suit against the State and is forbidden by the eleventh amendment to the Constitution of the United States.

The fifteenth paragraph of the bill expressly states that the said Wirt Adams "threatens to sue in his capacity as State revenue agent," the object and intent "being to deny your orator's rights in the premises."

Record, p. 8.

This is directly in the teeth of the eleventh amendment.

It is said by this court that "a bill, the object of which is by injunction indirectly to compel the specific performance of the contract by forbidding all those acts and doings which constitute breaches of the contract, must necessarily be a suit against the State. In such case, though the State be not nominally a party on the record, if the defendants are its officers and agents, through whom alone it can act in doing and refusing to do the things which constitute a breach of its contract, the suit is still in substance, though not in form, a suit against the State."

In re Ayers, 123 U. S., 502–504.

And the distinction is clearly pointed out between this class of cases and those where the officer acts summarily and has mere ministerial duties to perform. In the latter case the wrong, if any there be, may in many cases be irremediable.

Ib., pp. 506–507.

But in the class under consideration the party has a plain remedy by writ of error to this court. .

Ib., pp. 494, 495.

This case is affirmed in—

Hans *vs.* Louisiana, 134 U. S., 10.

And distinguished in—

In re Tyler, 149 U. S., 165, 166, 190, 191.

And again referred to in a case where it is held that one of the tests is whether the State would be bound, as it clearly would be here.

Tindall *vs.* Wesley, 167 U. S., 219, 220, 223, 224.

The revenue agent can sue at law or in equity in any case where the State or any county or town can sue, and while he sues in his own name it is for the use of the State, counties, or towns interested.

Annotated Code of 1892, § 4194.

Laws of 1894, p. 29, § 2.

It is exactly like the case of *In re* Ayers, *supra*, where the suits were for the use of the State, counties, and towns.

We think it is plainly, in its true essence and object, a suit against the State.

The doctrine of *In re* Ayers was approved and applied in—

Fitts *vs.* McGhee, 172 U. S., 524–528.

Harkrader *vs.* Wadley, 172 U. S., 169, 170.

Hence we ask this court, first, to dismiss this appeal for want of jurisdiction, and, second, if there is any ground on which they feel authorized to take jurisdiction, that it be affirmed as a delay case, it being not only palpably a suit against the State of Mississippi, but involving no proper Federal question on the merits, but plainly intended to get the matters and suits tangled up in a sea of inextricable confusion, there being a plain, speedy, and adequate way and opportunity to test whatever rights they may have through and by a writ of error from the State supreme court following the writ of error in the former case, No. 244 here, and also by writs of error from this court to said State supreme court for the same identical taxes involved here.

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